

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
SAN FRANCISCO BRANCH OFFICE

DIRECTV U.S. DIRECTV
HOLDINGS, LLC

and

Case No. 21-CA-39546

INTERNATIONAL ASSOCIATION OF
MACHINISTS AND AEROSPACE
WORKERS, DISTRICT LODGE 947,
AFL-CIO

Jean C. Libby, Esq., for the General Counsel.
Gregory D. Wolflick, Esq., Wolflick
& Simpson, of Glendale, California, for the
Respondent.
Adam J. Luetto, Esq., of Weinberg,
Roger & Rosenfeld, of Los Angeles, California,
for the Union.

DECISION

Statement of the Case

GERALD A. WACKNOV, Administrative Law Judge: Pursuant to a notice of hearing in this matter was held before me in Los Angeles, California, on July 19 and 20, 2011. The charge was filed by International Association of Machinists and Aerospace Workers, District Lodge 947, AFL-CIO (Union) on October 18, 2010, and an amended charge was filed by the Union on April 20, 2011. Thereafter, on April 21, 2011, the Regional Director for Region 21 of the National Labor Relations Board (Board) issued a complaint and notice of hearing alleging a violation by DirecTV U.S. DirecTV Holdings LLC (Respondent) of Section 8(a)(1) and (3) of the National Labor Relations Act (Act). The Respondent, in its answer to the complaint, duly filed, denies that it has violated the Act as alleged.

The parties were afforded a full opportunity to be heard, to call, examine, and cross-examine witnesses, and to introduce relevant evidence. Since the close of the hearing, briefs have been received from counsel for the General Counsel (the General Counsel), counsel for the Respondent and counsel for the Union. Upon the entire record, and based upon my observation of the witnesses and consideration of the briefs submitted, I make the following:

Findings of Fact

5

I. Jurisdiction

10 The Respondent, a California State corporation, maintains an office and place of business in Riverside, California, where it is engaged in the business of providing digital television entertainment services. In the course and conduct of its business operations the Respondent annually derives gross revenues in excess of \$100,000, and annually purchases and receives at its Riverside, California facility goods, products and materials valued in excess of \$50,000 directly from points outside the State of California. It is admitted and I find that the Respondent is, and at all material times has been, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

15

II. The Labor Organization Involved

20 It is admitted, and I find, that the Union is, and at all times material herein has been, a labor organization within the meaning of Section 2(5) of the Act.

20

III. Alleged Unfair Labor Practices

A. Issues

25

The principal issues in this proceeding are whether the Respondent has violated and is violating Section 8(a)(1) and (3) of the Act by suspending and discharging employee Gregory Edmonds, and whether the Respondent has violated and is violating Section 8(a) (1) of the Act by promulgating and maintaining in effect various handbook provisions and other rules or policies which prohibit lawful Section 7 union or protected concerted activity.

30

B. Edmonds' Suspension and Discharge

1. Facts

35

The Respondent, a nationwide company with facilities throughout the United States, including the Riverside, California facility involved herein, installs TV satellite dishes for consumers.

40

Gregory Edmonds was employed by the Respondent as an installer, also referred to as an installation technician, from November 2007, until his discharge on July 28, 2010.¹ Edmonds was one of approximately 50 installers working out of the Riverside facility.

45

Installers are primarily paid on a piecework basis; that is, according to how many installations they complete during the workday. The more installations, the more money they earn. However, if their piecework pay during the pay period is less than a guaranteed minimum base pay, they receive the guaranteed minimum amount in lieu of their piecework earnings. There were three tiers of base pay for the installers, according to their expertise with certain types of installations, and Edmonds had attained the highest level approximately 2 weeks prior to his termination. Edmonds was also one of five or six installers who would be assigned service tech work, that is, troubleshooting previously installed equipment pursuant to customer inquiries or complaints.

50

¹ All dates or time periods herein are within 2010, unless otherwise specified.

During times material herein the installers have complained about certain inequities with this pay system as well as related matters resulting from the daily routine of having to wait in line at the Respondent's facility each morning to obtain the requisite equipment to be installed at the customers' premises. Thus, in addition to the frustration of simply having to wait in line, the wait time also impacted their earnings.

Another matter about which certain employees complained was the lengthy commute time it would take for certain Riverside installers to drive from Riverside to customers' locations in the San Diego area. This, too, impacted their earnings.

Edmonds, who, according to the Respondent, was discharged for using profanity toward Riverside Operations Manager Freddy Zambrano, testified that from the time he was hired he regularly used profanity, which he termed "construction talk," including the "f-word," on a daily basis, to punctuate his conversation with his coworkers, with his supervisor, Lamar Wilson, as well as with Manager Zambrano.

Other employees also testified about the use of profanity by employees, supervisors, and managers alike at the Respondent's facility. Former employee Matthew Webster testified that at supervisory team meetings conducted by Supervisor Lamar Wilson, who was also Edmonds' supervisor, installers would complain about work-related matters, characterizing certain new changes or requirements as "fucking bullshit," as the additional requirements impacted the number of installations that could be completed and thereby effected the installers' compensation. Such or similar language was not unusual. At no time were employees told by Supervisor Wilson to watch their language; and sometimes Wilson also used such language.

Webster testified the average time for waiting in line each morning was about 45 minutes, and employees would complain about the wait in the presence of supervisors or managers, including Zambrano. They would make such statements such as, "This is a fucking waste of my time." Webster recalled one occasion when Zambrano asked him how things were going. Webster answered, "This fucking sucks," and Zambrano replied, "Well, you've got to fucking deal with it." At one weekly meeting, conducted by Zambrano and attended by all the employees, Zambrano said, according to Webster, "Why aren't these fucking vans clean?" On another occasion, when Regional Manager Scott Thomas was conducting a meeting at the facility, Thomas told the assembled employees, "We got to do our fucking jobs. These vans should be cleaned. You know, this is how we represent our company."²

Brandon Ojeda, a current employee, reluctantly agreed with the statement in his Board affidavit that on one occasion Zambrano called him in to the office to be admonished for a work-related matter, and asked Ojeda, in the presence of Supervisor Wilson, "Is this the fucking type of work you do?" Ojeda answered, "This ain't the fucking type of work I do." Ojeda, during the course of his testimony, however, claims that although his affidavit is correct as far as it goes, he, rather than Zambrano, was the first to utter profanity. Thus, he claims that when he entered the room he jokingly said, "Another F'ing promotion." This does not appear in his affidavit, however.³

² Neither Supervisor Wilson nor Regional Manager Thomas testified in this proceeding, and Zambrano did not contradict this specific testimony of Webster. I credit Webster.

³ I do not credit Ojeda's testimony in this latter regard. As amply demonstrated throughout his testimony, he was clearly fearful of having to testify against his employer in this proceeding.

Edmonds testified that about a month prior to his discharge he met with union representatives at the home of coworker Brandon Ojeda. Another employee, Matthew Webster, was also present. The three employees, according to Edmonds, were told by the union representative to just try to get a feel for who might be interested in union representation. After this meeting Edmonds spoke to about four coworkers in a general manner about whether they might be interested.

About a week after the aforementioned union meeting at Ojeda's home, according to Edmonds, the Respondent conducted a Saturday morning meeting at the Riverside facility. Saturdays are the only day of the week when all installers are required to work, apparently because this is the day when most installation customers will be at home. Saturday meetings were held on a regular basis to discuss any work-related issues or problems that employees may have encountered during the week. Manager Zambrano customarily conducted the Saturday meetings, but on occasion Area Manager Scott Thomas would conduct the meetings. However, unlike other Saturday meetings, an announcement was posted at the facility that this particular meeting⁴ was a mandatory meeting that all employees were required to attend. Some 60 to 80 employees, supervisors, and managers, attended this meeting.

Zambrano began the meeting by introducing Adrian Dimech, vice president of operations for Southern California, and said that Dimech had some union matters to discuss. This is the first time the subject of union representation had come up at a company meeting. According to Edmonds, Dimech "just began his meeting by telling us that there was another office in Rancho Dominguez that had voted to have a union come in and that the union won the election and that he was there to talk to us about trying to keep that from spreading to other sites."⁵ "Mainly," according to Edmonds, "he was asking us if there were issues that he could address so that that wouldn't become a necessity. If everything was taken care of on that level, then there really wouldn't be a need for a union in his mind."⁶

⁴ The date of this meeting is in contention, *infra*.

⁵ Respondent's installers at a nearby facility in Rancho Dominguez, California, had voted in an NLRB election, held on April 16 (Case 21-RC-21191), to be represented by the Union involved in this proceeding. During the preelection campaign at that facility the Respondent had advised the installers it opposed union representation. The Respondent filed election objections premised, *inter alia*, on the contention that one or more of its supervisors tainted the election process by engaging in prepetition prounion solicitation of union authorization cards, activity that undermined the employees' free choice in the election. A hearing on election objections was held on June 8 and 9. The hearing officer determined in his report, dated July 7, that in fact supervisory involvement tainted the election process, and recommended that the election results be set aside. At the time of the hearing herein, this matter was pending before the Board.

⁶ Dimech was involved in the Respondent's Rancho Dominguez preelection campaign. Noe Gallegos, a former field supervisor at the Rancho Dominguez facility who was terminated from that facility on about May 18, and who has a current charge pending with the Board over his discharge, testified in the instant proceeding. Gallegos testified that Dimech, who participated in two meetings with supervisors and, although Gallegos' testimony is unclear on this point, conducted perhaps some or all of eight meetings with the entire employee complement, asked Gallegos to identify employees and supervisors who were supporting the union. He told Gallegos that he was authorized to grant him "immunity"—Gallegos understood that it was immunity from discharge—in exchange for his assistance. Gallegos said he did not know who was prounion or procompany. Dimech told him, "If the union was to come in, that the site could possibly be closed, that the work could be handed out to contractors." I credit Gallegos' testimony.

This invitation by Dimech for the employees to present their concerns prompted a few employees to speak up with complaints or suggestions. Edmonds spoke up. He had several issues. Edmonds, who was one of the installers sometimes assigned San Diego duty, complained that he and other installers were not being sufficiently paid for the time—some 2 hours—that it took them to drive from Riverside to San Diego; and moreover, once they arrived, they were sometimes unable to complete the installation because of some problem at the site. He complained that this was a big waste of time, for which the installers were not receiving travel time over and above their minimum hourly rate, thus affecting their compensation. In response to this complaint, Dimech, according to Edmonds, said he would see what he could do to change that. Edmonds also complained about the Respondent's practice of adding time-consuming tasks to the job assignments of installers at the site, which would reduce the number of installations per day and also affect their compensation. Edmonds said he thought this was unfair.

Further, Edmonds said that it would be more advantageous or fair if the installers were paid only an hourly rate, at an increased hourly amount, rather than the then-current hourly/piecework rate, so that they could make more money. Regarding this particular request, Dimech replied that such a proposed change was not his decision to make, that decisions of that nature were "far over his head," and that all he could do was present this suggestion to the company. To this remark, Edmonds replied, "Okay. So you just said as an individual that you can't do anything for us. But [what] I'm wondering is if we were a collective body if maybe the company might hear us." Some employees, according to Edmonds, were saying they didn't want a union and others said they did. Employee Brandon Ojeda backed up Edmonds, and said "they might hear us better if we were a collective body than just a bunch of individuals."⁷

According to Edmonds, Dimech "just kind of turned red and didn't really have much of a response at all." According to former employee Matthew Webster, who also spoke up at the meeting, Edmonds' remarks caused Dimech some consternation: Dimech "seemed a little dumbfounded. He wasn't prepared for the conversation that he was having that day."⁸

⁷ As noted above, Brandon Ojeda, a current employee, was a very reluctant witness. He was upset that he had been subpoenaed to testify. He seemed fearful of testifying against his employer, and accused the General Counsel of "throwing me under the bus completely. . . ." Ojeda testified as follows regarding Dimech's remarks at the meeting: "I mean, there's no beating around the bush. He [Dimech] was trying to talk guys out of not liking the union. And that's what it was." Ojeda's affidavit states: "The gist of what Dimech said was that the union was bad for us and DirecTV wouldn't allow it." During his testimony Ojeda confirmed that this was the understanding he took away from Dimech's remarks. I credit Ojeda's testimony.

⁸ According to Webster, Dimech was portraying the union as "bad, bad, bad." Webster testified he did not directly come out in favor of the Union but rather suggested to Dimech that if the company did not want a union it should not ignore the requests of the employees for the opportunity to earn more money. Dimech said he would look into it. However, Webster testified that Edmonds' remarks were more forceful. Webster characterized Edmonds' remarks as follows: "He was basically saying, 'Don't listen to him [Dimech]. You know, the union is a good thing. You know, if we all stand together, it's not just one voice. It's all of us. That's what a union is.'" After the meeting some employees thanked Edmonds for saying what they themselves wanted to say.

The meeting lasted approximately an hour. Some of the employees complemented Edmonds for speaking up, and one coworker said he was his hero.⁹ Then Edmonds gathered his supplies and proceeded to his van in preparation to make his installation calls for the day.

5 Dimech followed Edmonds to his van. He asked Edmonds what he, Dimech, could do about the issues that were raised. After some discussion, Dimech said he would address the issues and see if he could get them taken care of. Edmonds replied, "that would be great," adding, "it probably wouldn't be necessary for a union to come in if DirecTV would take care of this stuff." Edmonds further said, "But I told him that they weren't taking care of it. And that I knew that the
10 only reason that he was here for this meeting was to discourage the union from coming in." Dimech replied that they had "things that were in the works . . . that they were going to be offering us. But that they couldn't do that right now with all of this pending because . . . it could tie up negotiations or whatever for quite a while depending on the outcome of this whole union being voted in or not." Dimech said he "couldn't elaborate on what the Respondent was going
15 to be offering us." The conversation lasted about 45 minutes. During this conversation Edmonds was apparently cleaning out his truck from the day before, and Dimech asked if he could take Edmonds' trash back to the office and throw it away for him. He gave Edmonds his business card and said, "if there was anything he could do for me to give him a call."

20 Regional Operations Vice President Dimech testified that he oversees 11 facilities employing a total of about 900 employees. Scott Thomas, regional director of operations, Southern California, reports to Dimech, and Riverside Manager Zambrano reports, in turn, to Thomas. Dimech testified that the meeting he held with the Riverside employees was on May 22, and he knows this "because I looked it up on my calendar." He testified it was not
25 possible that the meeting could have been held during the month of June, as Edmonds had testified, "because we were moving facilities around at that time, and it would have been logistically difficult and cumbersome for us to have conducted the meetings around that time." He had conducted other meetings with the Riverside employees, and may have attended meetings prior to May 22, during which employees also raised concerns about having to wait in
30 line to get their equipment.

Dimech testified that he scheduled the meeting merely as a "courtesy" to the Riverside employees to update them on the union situation at the Rancho Dominguez facility, as employees of the two facilities would talk about such matters among themselves. Dimech said
35 that at the time of the meeting or thereafter he was not aware of union activity among the Riverside employees, and that the meeting was not in response to such activity. The meeting lasted about 45 minutes. Dimech spoke about the union election in Rancho Dominguez that had been held on April 16. He told them the Union had won the election by a margin of three votes, but there was a hearing pending to determine whether the election would be invalidated, as
40 there was good reason to suspect that supervisors had been involved in the solicitation of union cards. He explained to the employees the seriousness of signing union cards and cautioned them that cards should be signed only after they were fully educated on the implications of signing a card. He did not tell them not to sign cards. Asked whether he communicated anything else about unions in general he said, "no, I don't believe so." Dimech testified that
45 several employees spoke up and "said they were advocates of union representation."

While Dimech denied that he became flustered during the meeting as a result of employees' union advocacy, he did not specifically deny or otherwise contradict the accounts of the meeting testified to by Edmonds and other employees, supra. Dimech testified that his

⁹ Eber Urretia, a current employee who appeared reluctant to testify on Edmonds' behalf, testified that after the meeting he "probably" approached Edmonds and told him "not to try to be a hero because that's going to bite him in the butt."

subsequent conversation at Edmonds' van lasted approximately 10 minutes, rather than about 45 minutes as Edmonds testified, but he did not otherwise deny or contradict Edmonds' account of the conversation.

5

Zambrano testified that he was present during the entire meeting and heard Edmonds' comments and the comments of others. Zambrano testified that Edmonds' comments at the meeting that day were not any different than comments he had made during other meetings, except for "the fact that he expressed his experience was—he had been involved—he had been involved with unions before." Asked whether Dimech's remarks were to the effect that the Respondent did not want a union, Zambrano answered, "possibly."

10

Edmonds testified that on the first or second workday following the Saturday meeting, Zambrano made the statement in front of him, "Well, we're going to go out and QC all of Greg's jobs today." This comment was overheard by another employee, who so testified, adding that Zambrano did not appear to be joking.¹⁰ Apparently there was no further exchange between Edmonds and Zambrano on that occasion. Zambrano, during the course of his testimony, answered "no" when asked whether he "recalled" making such a statement, but did not specifically deny making such a statement.¹¹

20

Also, according to Edmonds, on about the same day the office secretary came out to Edmonds' vehicle, and showed him a document reflecting a call from corporate headquarters. The document stated that Edmonds, and apparently the other Riverside installers who were assigned San Diego installations, were going to be paid for the aforementioned issue that Edmonds had raised at the meeting with Dimech. Later that day Edmonds received a phone call directly from Dimech, who also told him he would be paid "for those issues that I brought up." Edmonds, who had never before received a call from Dimech, simply thanked him.

25

Edmonds regularly complained to Zambrano and to Lamar Wilson about the long wait in line each morning, sometimes for as much as an hour and a half, to be issued the satellite dishes and receivers he would need for the day's scheduled installations. The line was not monitored, and, adding to the frustration was the fact that some installers would let their buddies cut in line. Edmonds' protestations were to no avail; both Zambrano and Wilson told him they could not do anything about it. Other installers also complained on a daily basis. As the Respondent was preparing to move to a new Riverside facility—the Myers Street location—Zambrano told the employees that the new facility would have lockers for each installer, and that the lockers would be stocked the night before with the components they would need the following day; in this manner the wait in line would be eliminated. However, according to Edmonds, the situation did not change when they moved to the new Myers Street location in

35

¹⁰ Mathew Webster testified he overheard this conversation. He heard Zambrano tell Edmonds "that he would be QC'ing all his jobs from now on." According to Webster, this statement was tantamount to saying that Edmonds would be kept under surveillance. Zambrano appeared to be serious, and, according to Webster, there would have been no reason to make such a statement in jest. Zambrano, during his testimony, did not specifically contradict Webster's testimony, but said he didn't "recall" making such a statement.

¹¹ While supervisors routinely go out on quality control inspections checking the work of the installers they supervise, each supervisor has about 15 installers under his supervision and there is no showing that a supervisor would QC each and every job of a particular installer.

early July, even though the lockers were in place.¹² Accordingly, the complaints of Edmonds and other employees continued.

5 On the morning of July 21, at about 6:30 a.m., Edmonds met with Supervisor Wilson and received the hard copies of his work orders for the day. Then, as was his routine, he began standing among the other installers to get his materials. According to Edmonds, there was no actual "line," but rather a disorganized gathering or crowd of some 40 to 60 installers. Edmonds testified that after standing there for quite some time, watching other installers letting their friends cut in, he "was getting frustrated because that takes away from my time to get to a job to do what I have to do in a timely fashion without having a customer call in and say where am I or this and that." At this time Zambrano happened to walk into the warehouse. Edmonds noticed his presence, and, from about 20 or 25 feet away, over the rather noisy chatter of the installers, Edmonds said to Zambrano, "Freddy, can't you do something about this fucking line? I stand in this fucking line ten hours a day." Zambrano walked over, put his arms out as if to block others from getting in front of Edmonds, and said, "Oh, Greg. Nobody cut in front of Greg. Okay?" Edmonds said that he "felt kind of stupid and humiliated, and shut up and got his stuff and went to work." Apparently this incident was over in a matter of seconds.

20 The following morning, July 22, Edmonds saw on his handheld computer that he had received no assignments. He drove to the facility and spoke with Supervisor Wilson. Wilson told him that Zambrano wanted to have a talk with him. He met with Zambrano and Assistant Manager Roy Cienfuegos. Zambrano handed him an Employee Consultation Form dated July 21, and told him that he was going to be suspended for his outburst the day before. The form states, inter alia, as follows:

Insubordination toward a supervisor, manager, security representative or other designated person in authority.

30 On Wednesday, July 21, 2010 at 7:30 AM, Greg Edmonds started yelling towards Freddy Zambrano (Operations Manager) that he needed to "Fucken do something about this Fucken line", and that it was "Bullshit!" that he had to wait for like 10 hours, while other techs cut in front of him. I told him that I did not think he was waiting in line for 10 hours, and that the lockers should be ready for use by this upcoming Saturday. He then continued to curse in line in front of other technicians, Thus creating an uncomfortable and hostile work environment.

40 The "Corrective Action" portion of the form notes that Edmonds was being given a "Suspension." The "Action Plan" portion of the form notes that "Immediate and sustained improvement must be shown or further disciplinary action may be taken up to and including termination,"¹³ and further notes that the suspension was to end on July 28. Edmonds did not dispute the matter, signed the form, left the office, and removed his tools from his van in preparation for being driven home by Manager Cienfuegos. Before leaving the facility he had a conversation with his supervisor¹⁴ and a further conversation with Zambrano.

¹² In preparation for the new procedure, the installers were to return to the facility each night and fill out paperwork showing what they would need for the day's work, so that the items could be placed in their lockers by the following morning.

¹³ This particular language is preprinted on each Employee Consultation form, regardless of the action to be taken.

¹⁴ The record does not note the substance of this conversation.

Edmonds testified that during his subsequent conversation with Zambrano he apologized to Zambrano for “the whole situation,” and suggested, as a resolution of the problem, that poles or standards be set up in the warehouse “so that there would be an orderly line instead of a big crowd.” Zambrano told him it didn’t matter, as the guys would ignore the poles; further, he said that the lockers would be ready soon. Edmonds asked him, “You’re not going to fire me, are you?” Zambrano said, “No. When you get back from your suspension, you’ll go back to work.”

Manager Cienfuegos drove Edmonds home that day. Cienfuegos testified that during the drive home Edmonds apologized and told him “he was sorry for what had happened and that he wished he could take it back.”

After the suspension period¹⁵ Edmonds phoned Supervisor Wilson about returning to work. Wilson told him he would be notified. Shortly thereafter he received a phone call from the office secretary, who instructed him to meet with Zambrano that afternoon. He arrived for the meeting. Zambrano told him that “after talking with Scott Thomas and the HR department that my employment with DirecTV . . . was being terminated.” He was given another Employee Consultation Form. The form, dated July 28, contains the identical language as the July 21 form, except the “Corrective Action” portion of the form notes, “Termination of Employment,” and the “Action Plan” portion notes, “Discharge . . . 7/28/2010.”

Operations Manager Frederico Zambrano¹⁶ is the highest-ranking management official at the Riverside facility, and has worked at the Riverside facility in this capacity since August 2008. At the time of the incident herein there were between 80 to 90 employees at the Riverside facility, including five installer teams. Each team is headed by a field supervisor, and consists of about 15 installers. When initially asked whether employees used profanity in the workplace, Zambrano testified, “Not that I was aware of.” Later during his testimony, however, Zambrano agreed that “employees use profanity in the workplace but they don’t direct it at a supervisor in this fashion.”¹⁷ While Zambrano testified he did not use profanity in talking to employees as he interfaced with them in work areas, he agreed that behind closed doors he more than once has used profanity while talking with individual employees.

Zambrano testified that he liked Edmonds just as well as he liked all of his employees, and understood their frustrations with having to stand in line. Describing the incident, Zambrano testified that Edmonds was “uptight, he was pretty much screaming/yelling out loud.” Asked what it was that caused him to think Edmonds had violated company policy, Zambrano replied, “[H]e had cursed at me in front of other employees.” Zambrano prepared the employee consultation form immediately after the incident. When he suspended Edmonds the following day, Edmonds apologized, saying that “he was sorry and he knew he was wrong,” and that “he knew he could have just came to me and talked behind closed doors and he could have, you know, probably got his point across better.” Zambrano did not deny Edmonds’ testimony that during a subsequent meeting shortly thereafter, before Edmonds left the premises and was driven home, Zambrano specifically told Edmonds he would not be terminated and would be returning to work after his suspension period.

¹⁵ While not entirely clear, it appears that this constituted a 4- or 5-day suspension, although Edmonds understood it to be a 3-day suspension.

¹⁶ This position is also referred to as site manager.

¹⁷ Zambrano, generally, did not impress me as a credible witness, and frequently gave succinct responses to leading questions in a manner that he believed would be most beneficial to the Respondent’s position, regardless of their accuracy.

Eber Urrutia, currently an installer and formerly a supervisor, has worked for the Respondent for approximately 8 years. He was called as a witness by the General Counsel. Urrutia testified installers would grumble among themselves on a daily basis and would also complain to supervisors about having to wait in line each morning to receive their equipment. The complaining diminished after the move to the Myers Street facility,¹⁸ but did not stop.

Urrutia testified that at the time of the July 21 incident there were approximately 50 or 60 employees in line for supplies. They were talking, and the noise level was high. Edmonds was some 10 to 15 feet from Zambrano when he asked him, "What are you going to do about this fucking line," and "kept cussing, to be honest with you." Zambrano didn't say much, but "his face was in shock." Urrutia testified he was surprised Edmonds would make such a remark in front of Zambrano. He was not surprised to learn that Edmonds would be disciplined for his conduct, as this was simply not the appropriate way to talk to the manager.

Zambrano testified that although termination decisions were his to make, his boss, Regional Operations Director Scott Thomas, had to be "advised" of termination decisions, and that Human Relations Generalist Marianne Hamada had to be contacted.

As noted above, during the July 22 consultation and suspension interview, Edmonds told Zambrano that "he was sorry and he knew he was wrong." After that interview and suspension, Zambrano again phoned Hamada and reported what had transpired, telling her that Edmonds had apologized; he also told her that he had reviewed Edmonds' file and that he was "on a final and had been written up." Zambrano testified that at this point he had not yet decided whether to terminate Edmonds, and did not make the determination to discharge Edmonds until the following day, July 23.¹⁹ Zambrano also testified that even if there were no other warnings in Edmonds' file, he "probably" would have still fired Edmonds for this one incident, and that Edmonds' prior history and "final" warning, *infra*, "definitely" played a role. According to Zambrano, a final warning "basically means that [an employee is] on his final incident and any other incident moving forward can be grounds for termination."²⁰

Edmonds, who had worked for the Respondent since November 2007, had been issued a number of Employee Consultation or Corrective Action forms during the course of his employment. The warnings or other corrective action incidents prior to July 21 generally involved technical performance-related matters in the field. None of the write-ups involved insubordination toward management, or interaction difficulties with coworkers or customers.

Edmonds' write-ups are as follows. On March 20, 2008, he was cited for failing to bring a job up to code; the form shows he was given both a "written" and "final" warning although there is no showing that he had ever received a previous warning of any kind for any reason. On February 5, 2009, he was cited for not properly grounding an installation, and given a "written" warning. On March 20, 2009, he was cited for using existing cable on a new install rather than

¹⁸ While Urrutia did not so specifically testify, this was apparently because the employees understood that when the new locker system was in place there would be no more waiting.

¹⁹ I do not credit Zambrano, and find, *infra*, that in fact he had decided not to discharge Edmonds over this incident.

²⁰ The record shows that the Respondent's disciplinary procedure is not "progressive" in the sense that a subsequent discipline must be more stringent than a prior discipline. Neither the Respondent's procedure nor practice mandated any particular disciplinary action, and the degree of discipline, if any, was entirely within Zambrano's discretion. Moreover, contrary to Zambrano's testimony, there is no showing that "final" warnings are followed by terminations; rather, suspensions, verbal warnings, or written warnings seem to follow final warnings.

new cable, and given a “final” warning. On September 6, 2009, he was given a “written” warning for failing to replace all unapproved connectors creating a repeat service call. On about November 9, 2009, a person called the facility giving Edmonds’ van number, and reported a tailgating incident; Edmonds was given a “verbal warning.” On January 6, Edmonds was cited for completing a Satellite installation that did not meet company standards; he was given a “final” warning and the form notes, “You will be suspended for 2 days.” On January 21, he was “suspended pending investigation” for failing to precall customers; there is no showing that he was given a warning of any kind.²¹ On March 12, he was cited for failing to completely fill in his timesheet and was given a “verbal” warning. At the time of the foregoing write-ups or counseling interviews, Edmonds agreed with or did not dispute some of them, and did dispute others.

Edmonds testified that he would stop by Zambrano’s office on a daily basis just to say hi. About 2 weeks prior to his discharge he stopped by Zambrano’s office to perhaps get a pat on the back for having a high performance rating as reflected in an “Employee Breakdown Sheet” that had been given to him. He was pleased about having earned a high rating in the category dealing with “hooking up the phone lines of the customer to our equipment.” He showed the document to Zambrano, who told him that now that he was certified for “Wild Blue” internet installations he would be given a raise; the raise was to the highest level of pay an installer could earn.²² As noted, in addition to being at the top of his pay scale as an installation technician or installer, Edmonds was one of several individuals who would also be utilized as a service technician. Service technicians earn a higher rate of pay than installers, and, according to Zambrano, the position of service technician is considered to be a “higher” classification than that of an installation technician.

Edmonds testified that in May, Zambrano suggested that he apply for the position of field supervisor, as there was an opening. The application, dated May 27, was signed by Edmonds; however he decided not to submit it as he was told by a former supervisor, currently a technician, that technicians, on an hourly basis, made more money than supervisors given the amount of hours supervisors had to work. Zambrano denied that he told Edmonds he should apply for a job as a field supervisor. He testified that he would not have done so because of Edmonds’ prior write-ups, and because he did not think Edmonds would be a good supervisor as he “just wasn’t a good performer.”²³

Regarding Edmonds’ performance, there is no showing that at the time of the July 21 incident the number or quality of Edmonds’ installations was below par. He had not received a further Corrective Action Form reflecting performance issues since January 17, supra. Further, documentary evidence shows that he ranked well above average in “customer satisfaction.” Customer satisfaction is evaluated each pay period. A report dated March 8, shows Edmonds’ customer satisfaction score as 100 percent, and his past 12-month score as 100 percent, whereas the average site score for all the Riverside installers was 89 percent and 89.22 percent, respectively. A more current report, dated June 29, shows Edmonds’ customer satisfaction score as 100 percent for the past 90 days, and 98.67 for the past 12 months, while the average site score for all Riverside installers was 89.56 and 89.56, respectively.

Zambrano testified that during his tenure as operations manager the only other employee who used profanity against a supervisor or manager was also discharged. That

²¹ According to Edmonds’ testimony he was suspended over this incident after which he returned to work; the number of day(s) of his suspension is not stated.

²² Zambrano did not deny this testimony of Edwards.

²³ I credit Edmonds’ testimony and find that in fact Zambrano did suggest that he apply for the supervisory position.

employee was John Barrios, who was discharged for insubordination in May 2009. Barrios' Employee Consultation Form states that Barrios and other installers were told they would not be issued a gas card for their van unless they were wearing their reflective safety vest. Barrios, who was not wearing his vest, approached his supervisor for his gas card, and was told to return to his van for the vest before he would be issued a gas card. Barrios responded that he did not have to put it on, saying, "this is bullshit." He then returned to his van, put on his safety vest, and again approached the supervisor "and continued to be very confrontational and disrespectful, stating 'I don't play around like that, I'm a grown ass man.'" He then "snatched the gas card from [the supervisor's] hand and proceeded to pump gas." The form goes on to state: "This is considered insubordination and it is a violation of DirecTV Home Services personnel policies and procedures." Barrios was suspended pending investigation. After being presented with the Employee Consultation Form later that day, which he refused to sign, he was told by his supervisor to move his van to the warehouse so his equipment could be inventoried. Barrios said he would not give up his van without receiving a copy of the Employee Consultation Form. He was told that according to company policy he was not entitled to a copy of the form unless he signed it. He refused to give up his keys. According to the memorandum written by a supervisor, "Site Manager Freddy Zambrano then came out to see what the problem was and [Barrios] told [Zambrano] the same thing." Barrios continued to refuse to give up his keys and stated that he, Barrios, would call the police. In fact, Zambrano called the police and Barrios gave up his keys to the van.²⁴

Clearly, the above scenario surrounding the termination of Barrios, who directly defied his supervisor's orders, is unlike and readily distinguishable from the facts in the instant matter.

2. Analysis and Conclusions

Both the General Counsel and Respondent rely on the analytical framework set forth in *Atlantic Steel Co.*, 245 NLRB 814 (1979), to balance an employee's use of profane and insubordinate comments, uttered during the course of concerted activity, with "an employer's right to maintain order and respect in the workplace." *Piper Realty Co.*, 313 NLRB 1289, 1290 (1994). The General Counsel maintains that Edmonds' activity in protesting working conditions was clearly protected concerted activity, and that his use of profanity, under the circumstances, did not remove his conduct from the protection of the Act. The Respondent maintains that Edmonds' outburst was not concerted, as he was protesting not on behalf of others but rather on his own behalf; nor was his conduct protected, as his use of profanity toward Zambrano, under the circumstances, exceeded the bounds of permissible conduct.

I find no merit to the Respondent's contention that Edmonds was not engaged in protected concerted activity. The record clearly shows, and Zambrano acknowledged, that having to wait in line to get materials each morning was a significant matter of concern to all the installers. The daily waiting in line, the absence of an organized line, and the fact that the disorganization necessarily resulted in an even longer wait and added frustration for some employees, are inseparable elements of one overriding, common grievance. The failure or delay of the Respondent to put in place an appropriate system to resolve the underlying problem, whatever parts of the problem individual employees may have found most annoying, was admittedly an ongoing concern to all the installers, and clearly Edmonds was not speaking solely for himself in imploring Zambrano to do something about the situation.

²⁴ Zambrano testified that he was "pretty sure" Barrios' file reflected previous performance-related incidents, but he did not specify the dates or nature of such incidents.

The four factors to be balanced as set forth in *Atlantic Steel*, supra, are as follows: the place of the “discussion”; the subject matter of the discussion; the nature of the employee’s outburst; and whether the outburst was, in any way, provoked by an employer’s unfair labor practice. Moreover, relative weight is to be given to each of the four factors.

The “discussion” took place in a workplace setting in the presence of some 40 or 50 employees, and Edmonds’ comments were likely overheard by many if not all of the employees; while the underlying subject matter of the discussion was clearly a longstanding matter of legitimate concern to all employees, this should be tempered with the fact that the employees had previously been made aware that the problem would likely be resolved in a few days; Edmonds uttered profanities²⁵ in conjunction with his questioning Zambrano about when Zambrano was going to perform his job as manager by doing something about the employees’ complaint, and this, I conclude, would tend to diminish Zambrano’s status and authority in the eyes of the other employees and have a deleterious effect on his “right to maintain order and respect in the workplace”;²⁶ and finally, Edmonds’ outburst was not provoked in any way by Zambrano. Thus, from the foregoing, I conclude that each of the *Atlantic Steel* factors weighs in favor of the Respondent’s contention that Edmonds’ remarks removed him from the protection of the Act.

The complaint also alleges that Edmonds was suspended and discharged because of his union activity. The Respondent’s opposition to unionization is clear from the record evidence and, contrary to Dimech’s testimony, it is clear from the remarks Dimech made during his meeting with the Riverside employees that he was not there simply as a “courtesy” to update them on the union election at the Rancho Dominguez facility. Rather, I find, he was there to keep the Union’s efforts at Rancho Dominguez from spreading to the Riverside facility, or to stop a union campaign that he believed had already begun.²⁷ Edmonds directly challenged Dimech at the meeting, and let Dimech, Zambrano, and everyone else know, in no uncertain terms, that he did not believe any significant concerns of the employees could be resolved absent representation by a union. Then, at Edmonds’ van, when Dimech sought to let Edmonds know that his concerns would be immediately addressed, Edmonds remained unconvinced and continued to profess the need for union representation. Dimech said that other benefits would be forthcoming when the union situation in Rancho Dominguez was resolved, gave Edwards his business card, and told Edmonds to call him if there was anything else he could do for Edmonds.²⁸

²⁵ The record shows that employees, supervisors, and managers alike used profanity in the workplace. The record does not show, however, any prior instances of employees cussing out supervisors or managers in the workplace, in the presence of other employees, for failing to do the job that employees expected them to do. Accordingly, while there is precedent for the Respondent’s acceptance of profanity in the workplace, there is no precedent for the Respondent’s acceptance of profane outbursts in the workplace toward management.

²⁶ *Piper Reality*, supra; *Verizon Wireless*, 349 NLRB 640, 642 (2007) (profane references would necessarily have drawn attention and had a destructive effect on workplace discipline).

²⁷ There is no clear record evidence that the Respondent was aware of the union activity taking place at the Riverside facility.

²⁸ The Respondent maintains that the Dimech meeting took place on May 22, and the General Counsel places the meeting sometime in June. The date of the meeting is unclear and there is evidence to support either position. I conclude that under the circumstances it is unnecessary to determine whether the Dimech meeting took place in May or June.

A few days later not only was the San Diego matter resolved by giving a raise to the San Diego installers, but also Edmonds was called personally by Dimech to give him the news. At about the same time, on about the first workday after the Dimech meeting, Zambrano told Edmonds that all of his jobs would be QC'd. I find that in fact Zambrano made this statement; and I further find that, absent any other apparent reason or motivation, it was said in direct response to Edmonds' pronoun remarks at the Dimech meeting. Thus, Zambrano warned Edmonds that his work was to be monitored as a result of his protected concerted and/or union activity.

To summarize, the record abundantly shows the Respondent's antipathy toward unionization, and the Respondent's awareness of Edmonds' forceful defense of unions in general and his proclivity to speak up in front of employees and managers alike as an articulate advocate of his position. Moreover, I have found that as a result of his pronoun remarks he received a warning from Zambrano that his work was to be watched. Then, on July 22 he was suspended for his July 21 outburst, and on July 28 he was terminated.

Accordingly, all of the elements under *Wright Line*²⁹ have been established to shift the burden of proof to the Respondent to show that Edmonds would have been both suspended and discharged even absent his protected concerted and/or union activity flowing from his comments at the Dimech meeting. Assuming arguendo that the Respondent had a legitimate reason for merely suspending Edmonds as a result of his July 21 outburst, I find that the Respondent has not met its burden of establishing that Edmonds was also discharged for his July 21 outburst.

From the date of the Dimech meeting until July 22, Edmonds was never disciplined for work performance or any other reason.³⁰ On July 22, the day he was suspended for his July 21 outburst, Edmonds apologized during one or both of his conversations with Zambrano, and said he knew he had been out of line. And before he left the premises that day he specifically asked Zambrano whether he would be terminated. Zambrano pointedly replied that he would not be terminated, and would be returned to work at the end of his suspension. This comports with the July 21 Employee Evaluation Form Zambrano presented to Edmonds. The form does not state that Edmonds was simply suspended, or suspended pending investigation, but rather states that he would be suspended until July 28, a date certain. Accordingly, it is abundantly clear, and I find, that Zambrano had already decided on July 21, shortly after the incident, as he prepared

²⁹ *Wright Line*, 251 NLRB 1083 (1980), enf'd. 662 F.2d 899 (1st. Cir. 1981), cert. denied 455 U.S. 989 (1982).

³⁰ The Respondent maintains that Zambrano harbored no animus against Edmonds as exhibited by Zambrano's failure to discipline Edmonds for two incidents that occurred between the time of the Dimech meeting and Edmonds' July 22 suspension. One incident occurred in late May and the other in June. One involved a minor auto accident for which it was determined that Edmonds clearly was not at fault, as the other driver admitted fault. The other involved a complaint by a customer. Edmonds was suspended pending investigation of this incident, and Zambrano determined that the customer complaint was unwarranted as clearly demonstrated by records, namely Edmonds' telephone log, which conclusively showed that, contrary to the customer's contentions, he had in fact contacted the customer in a timely manner. As a consequence, Edmonds was absolved of the infraction and reimbursed his wages for the day(s) of his suspension. The fact that Edmonds received no discipline for these incidents does not show that Zambrano was lenient or fair with Edmonds; rather, it is clear that Zambrano simply had no supportable rationale for imposing discipline, as the documents precluded any reliance upon subjective considerations.

the Employee Evaluation Form, that Edmonds would be suspended but would not be discharged for his outburst.

5 This finding further establishes that at the time Zambrano decided to suspend but not discharge Edmonds, Zambrano was either aware of Edmonds' prior work history, or that Edmonds' prior work history simply did not matter to Zambrano; in either event, Zambrano had determined that Edmonds would not be discharged regardless of his work history.³¹ Thus, when Edmonds asked Zambrano whether he was going to be discharged, Zambrano was not
10 noncommittal, and did not reply that he didn't know or that he intended to review Edmonds' file during his suspension. Rather, he unequivocally answered "no," adding that Edmonds would be returned to work following his suspension. There is no contrary evidence.

15 It follows, therefore, that someone intervened between July 22 and 28, to cause Zambrano to change his mind and convert the suspension to a termination. I do not credit Zambrano's testimony to the extent it suggests or implies that he did not have his mind made up not to discharge Edmonds when he issued the July 21 counseling form, or that his review of Edmonds' personnel file was the determinative factor in making his decision to discharge Edmonds. During their July 28 conversation Zambrano said nothing to Edmonds about his
20 employment history or that he was on a final warning. Rather, he implicated others by telling Edmonds that after talking with Scott Thomas—Zambrano's boss and Dimech's subordinate—and the HR department, it had been determined that his employment was being terminated. And while Zambrano testified he advised HR that he had reviewed Edmonds' file, he did not testify whether or not he already knew or even cared what was in Edmonds' file before he allegedly
25 reviewed it. To summarize, the Respondent has neither admitted that Zambrano had a change of mind after issuing the July 21 suspension notice, as the evidence shows and I have found; nor has the Respondent affirmatively demonstrated that whatever it was that caused Zambrano to change his mind and convert Edmonds' suspension to a discharge was not motivated by unlawful considerations. Thus, the Respondent has failed to show that Edmonds would have
30 been discharged, rather than merely suspended, as a result of his July 21 outburst.

On the basis of the foregoing, I find that the Respondent has not satisfied its burden under *Wright Line*, supra, to show that Edmonds would have been discharged for the July 21 outburst even absent his protected concerted and/or union activity. Accordingly, I find that
35 Edmonds was discharged in violation of Section 8(a)(1) and (3) of the Act as alleged.

³¹ Indeed, not only had Edmonds received no adverse counseling forms for the 5 months or so prior to his suspension, but also he had received 100 percent on current customer satisfaction statistics, well exceeding the average customer satisfaction statistics of the Riverside installers for the preceding year. In May, Zambrano suggested to him that he apply for an open supervisory position. And about 2 weeks prior to his suspension he received a high performance rating for internet installations, and was given a raise by Zambrano, at which point he was elevated to the highest level of pay an installer could earn. Zambrano did not explain what motivated him to ignore or discount these current positive factors, and instead rely upon Edmonds' past discipline, in determining whether Edmonds should be discharged.

***C. Respondent's Handbook; Respondent's
DirecTV Policy Communications, Public Relations, and
Corporate Events Document***

5

1. Facts

10 The complaint alleges and the Respondent admits that on or about May 22, 2010, by distributing to employees a handbook, entitled Home Services Employee Handbook, Respondent promulgated and since then has maintained the following rules:

2.4 Use of Company Systems, Equipment, and Resources

15 Occasional and reasonable personal use of company property is permitted. Examples of reasonable use include use that is moderate and appropriate in duration and frequency, use that does not involve obscene or questionable subject matter, use that does not conflict with the company's Anti-discrimination/Harassment and/or conflict of interest policies, and use that is not in support of any religious, political, or outside organization activity.

20 **3.4 Communications and Representing DIRECTV**

To ensure the company presents a united, consistent voice to a variety of audiences, these are some of your responsibilities related to communications:

- 25
- Do not contact the media, and direct all media inquiries to the Home Services Communications department.
 - If law enforcement wants to interview or obtain information regarding a
- 30 DIRECTV employee, whether in person or by telephone/email, the employee should contact the Security department in El Segundo, Calif., who will handle contact with law enforcement agencies and any needed coordination with DIRECTV departments.

35 **4.3.1 Confidentiality**

- Never discuss details about your job, company business or work projects with anyone outside the company, especially in public venues, such as seminars and conferences, or via online posting or information-sharing forums, such as mailing lists, websites, blogs, and chat rooms
 - Never give out information about customers or DIRECTV employees. In particular, customer information must never be transmitted through regular unencrypted email, even internally within DIRECTV. If you have additional questions regarding data transmission guidelines, check with the IT department.
- 40
- 45

The complaint alleges and the Respondent admits that since at least on or about July 1, 2010, Respondent has maintained, in the DirecTV Policy Communications, Public Relations, and Corporate Events document, the following rules:

50

Employees

Employees may not blog, enter chat rooms, post messages on public websites or otherwise disclose company information that is not already disclosed as a public record.

Public Relations

Employees must direct all media inquiries to a member of the Public Relations team, without exception. Employees should not contact or comment to any media about the company unless pre-authorized by Public Relations. These rules are in place to ensure that the company communications [sic] a consistent message and to ensure that proprietary information is not released.

Following the issuance of the complaint the Respondent posted on its bulletin board at the Riverside facility the following Memo, on company letterhead, from Adrian Dimech, dated May 9, 2011, regarding DTVHS Employee Handbook and Company Policies:

The purpose of this memo is to clarify to you the intent of DTVHS in enforcing the policies set forth in the DTVHS employee handbook and those company policies posted on the DEN.³²

Employee Handbook

The policies contained in the DTVHS Employee Handbook previously distributed to you (including but not limited to confidentiality, using social media) will not be used to prohibit, discourage, or otherwise retaliate against employees who engage in conduct or communications protected by Section 7 of the National Labor Relations Act (such as lawful discussions whether with co-workers or third parties about wages, hours or working conditions.)

Company Policies

The company policies posted on the DEN (including but not limited to confidentiality, using social media) will not be used to prohibit, discourage, or otherwise retaliate against employees who engage in conduct or communications protected by Section 7 of the National Labor Relations Act (such as lawful discussions whether with co-workers or third parties about wages, hours or working conditions.)

If there should be any questions regarding this, please see your Human Resource Representative.

The Respondent also posted on the DEN the following announcement:

REFERENCE> Policies and Procedures

³² The "DEN" is the Respondents' intranet network through which all of Respondents' employees, nationwide, are kept current on company matters.

Employee Handbooks

Refer to the version of the handbook for your business unit. Refer to the DEN and other resources for the most up-to-date content from the printed copy of the handbook you received during new hire orientation.

The policies contained in the Employee Handbooks set forth below, will not be used to prohibit, discourage, or otherwise retaliate against employees who engage in conduct or communications protected by Section 7 of the National Labor Relations Act (such as lawful discussions whether with co-workers or third parties about wages, hours or working conditions.)

* * *

Company Policies

Company policies apply to all DIRECTV employees regardless of in which department or business unit an employee works. For a particular business unit's (Enterprise, Customer Care or Home Services) or department's procedures and rules, see the appropriate section on this page.

The Company policies that follow will not be used to prohibit, discourage, or otherwise retaliate against employees who engage in conduct or communications protected by Section 7 of the National Labor Relations Act (such as lawful discussions whether with co-workers or third parties about wages, hours or working conditions.)

Anti-discrimination/Harassment
Communications, Public Relations and Corporate Events
Company-paid Business Expenses for visitors
Compliance with Export/Import Laws and Regulations

2. Analysis and Conclusions

There is no contention that the Respondent has promulgated or enforced the foregoing provisions in the Employee Handbook (Handbook), or the DirecTV Policy Communications, Public Relations, and Corporate Events document (Policy document), for the purpose of inhibiting lawful union or protected concerted activity. However, it is alleged, and the General Counsel maintains, that each of the foregoing provisions are unlawful on their face as employees who may desire to engage in union or protected concerted activity, or have contact with the Board or Board agents, would be reluctant to do so if such activity or conduct would reasonably seem to be prohibited by any of the foregoing provisions.

The Respondent maintains the provisions are not unlawful on their face and, moreover, that no violation should be found as the Respondent, since the issuance of the complaint, has adequately advised its employees that the provisions should not be understood to inhibit lawful activity protected by the Act.

I find that handbook provisions 3.4 Communications and Representing DIRECTV, and 4.3.1 Confidentiality, are unlawful on their face, as they would reasonably tend to inhibit union or protected concerted activity by precluding employees from discussing wages, hours, and working conditions with employees and others, including union representatives, by precluding

employees from contacting or conferring with representatives of the media, and by causing employees to be reluctant to contact the Board or deal with Board agents. See, generally, *Flamingo Hilton-Laughlin*, 330 NLRB 287 (1999); *Lafayette Park Hotel*, 326 NLRB 824 (1998).

I find that Policy document provisions titled Employees and Public Relations are unlawful on their face as they would reasonably tend to inhibit union or protected concerted activity by precluding employees from discussing wages, hours, and working conditions with employees and others, including union representatives, through the internet and by other means, and by precluding employees from contacting or conferring with representatives of the media. *Ibid*.

I further find, contrary to the Respondent's contention, that the Respondent's disclaimers and corrective action are insufficiently specific and/or would be overlooked by employees reading the particular provisions in the written documents to warrant a dismissal of the pertinent compliant allegations. See, generally, *Passavant Memorial Area Hospital*, 237 NLRB 138, 899 (1978). However, under the circumstances, I do not believe that, as contended by the General Counsel and the Union, the provisions found herein to reasonably contain impermissible restrictions on employees' Section 7 rights should be entirely expunged from the relevant documents. The Respondent is a nationwide employer with several business units and many thousands of employees. To require the Respondent to expunge the relevant provisions may unduly interfere with legitimate employer prerogatives. Further, as noted in the Respondent's brief, it has attempted in good faith to resolve this matter through its various postings. It would appear most appropriate for the parties to explore modifications of the language or other alternatives during the compliance stage of this proceeding. Accordingly, the remedial action to be taken will be relegated to the compliance stage of this proceeding.

Regarding handbook provision 21.4 Use of Company Systems, Equipment and Resources, the General Counsel maintains that even though the Respondent prohibits "use of company property," namely company systems, equipment and resources, which includes the Respondent's email system, for purposes "of any religious, political, or outside organizational activity," this blanket prohibition should be found impermissible regarding Section 7 activity as it unduly restricts union and protected concerted activities. The General Counsel, citing *Register Guard*, 351 NLRB 1110 (2007), acknowledges that the Board has recently resolved this issue. I agree. I shall dismiss this allegation of the complaint.³³

Conclusions of Law and Recommendations

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. The Respondent has violated Section 8(a)(1) and (3) of the Act as found herein.

The Remedy

Having found that the Respondent has violated and is violating Section 8(a)(1) and (3) of the Act, I recommend that the Respondent be required to cease and desist from discharging employees in violation of the Act, and from promulgating and maintaining in effect certain

³³ The General Counsel maintains that *Republic Aviation*, 324 U.S. 793, 803 fn. 10, warrants a different result. This is a policy matter to be addressed to the Board.

employee handbook and other policy provisions that preclude and interfere with the Section 7 rights of employees to engage in union and protected concerted activity. Specifically, to remedy the unlawful discharge of employee Gregory Edmonds, I recommend the Respondent offer him immediate reinstatement to his former position of employment, and make him whole for any loss of earnings, including piecework wages, and other benefits lost as a result of his July 28, 2010 discharge, computed on a quarterly basis from July 28, 2010 to the date of a proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). Interest on amounts due to Gregory Edmonds shall be compounded on a daily basis as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010). I further recommend that the Respondent be required to remove from its files any reference to the July 28, 2010 discharge. I further recommend that the Respondent be required to cease and desist from in any other like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights under Section 7 of the Act. Matters pertaining to the employee handbook and other documents shall be relegated to the compliance stage of this proceeding. Finally, I shall recommend the posting of an appropriate notice, attached hereto as "Appendix."

ORDER³⁴

The Respondent, DirecTV U.S. DirectTV Holdings, LLC, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging employees for engaging in union and protected concerted activities in violation of Section 7 of the Act.

(b) Promulgating and maintaining in effect employee handbook and other provisions that preclude and interfere with the Section 7 rights of employees to engage in union and protected concerted activity.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action, which is necessary to effectuate the purposes of the Act.

(a) Offer employee Gregory Edmonds immediate and full reinstatement to his former position of employment and make him whole, with interest, for the loss of wages and other benefits he has suffered as a result of the discrimination against him, in the manner set forth in the Remedy section of this decision.

(b) Delete from all files, including the personnel file of Gregory Edmonds, any reference to his July 28, 2010 discharge, and notify Edmonds, in writing, that such reference to his discharge have been deleted.

³⁴ If no exceptions are filed as provided by Section 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Section 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(c) Modify its employee handbook provisions and other policy provisions found to interfere with the rights of employees to engage in union and protected concerted activities under Section 7 of the Act, and advise its employees, nationwide, by appropriate means, that such provisions have been revised.

(d) Within 14 days after service by the Region, post at its facility copies of the attached notice marked "Appendix."³⁵ Copies of the notice, on forms provided by the Regional Director for Region 21, after being duly signed by Respondent's representative, shall be posted immediately upon receipt thereof, and shall remain posted by Respondent for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. Further, when the appropriate handbook provisions and other policy provisions have been modified, notify its employees nationwide, by appropriate means, of the new modified handbook and policy provisions.

(e) Within 21 days after service by the Regional Office, file with the Regional Director for Region 21 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated: Washington, D.C. December 13, 2011

Gerald A. Wacknov
Administrative Law Judge

³⁵ If this Order is enforced by a judgment of the United States Court of Appeals, the wording in the notice reading, "Posted by Order of the National Labor Relations Board," shall read, "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

**NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
AN AGENCY OF THE UNITED STATES GOVERNMENT**

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO:

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WILL NOT discharge or otherwise discriminate against employees for supporting any labor organization or for engaging in activities protected by the National Labor Relations Act.

WE WILL offer Gregory Edmonds full reinstatement to his former job, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Gregory Edmonds whole, with interest, for any loss of earnings, including piecework wages, and other benefits resulting from his discharge.

WE WILL remove from our files any reference to the unlawful discharge of Gregory Edmonds, and notify him in writing that this has been done and that the discharge will not be used against him in any way.

WE WILL modify our employee handbook provisions and other policy provisions that have been found to restrain or preclude employees from exercising their right to engage in the union or protected activities listed above.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

DIRECTV U.S. DIRECTV HOLDINGS, LLC
(Employer)

Dated: _____ By: _____
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered with any other material. Any questions concerning this notice or compliance with its provisions may be referred to the Board's office, 888 South Figueroa Street, 9th Floor, Los Angeles, CA 90017-5449, Phone 213/894-5200.